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Supreme Court, U.S.
FILED

(1)

No. 94 871 OCT 27 1994

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DORIS MEREDITH,

PETITIONER,

vs.

FRANK TRUMAN SCARBOROUGH,
WALTIE ELAINE SCARBOROUGH,
WILLIE PROCTOR and
JOAN PROCTOR

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI AND ARGUMENT IN SUPPORT THEREOF TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

J. EARL SMITH
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128 SOUTH OATES STREET
DOTHAN, AL 36301
TELEPHONE NO.: 205/793-9882

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Engelhardt v. Jenkins, 141 So. 2d 193

(d)

CONSTITUTIONAL PROVISIONS

The Fifth and Fourteenth Amendment to the Constitution of the United States

Article I, Section 23, Constitution of Alabama

(a)

QUESTIONS PRESENTED

Was the Petitioner's Constitutional Rights under the Fifth Amendment violated when a trial Judge in Geneva County, Alabama, sua sponte, took an interest in her land without any condemnation or eminent domain proceedings and without a scintilla of evidence or even a request by any party to the litigation before the Court, i.e., riparian and water flow control questions.

(a1)

The caption in this cause contains all names of the parties to the proceeding in the Court whose Judgement is sought to be reviewed.

(e)

The unofficial report of the Opinion in this cause is:

Doris Meredith,

vs.

Frank Truman Scarborough,
Waltie Elaine Scarborough,
Willie Proctor and
Joan Proctor,

No.: 193-0305

The official Report is:

Meredith v. Frank Truman Scarborough, et als, So. 2d

The Order denying the Motion for Rehearing is reported unofficially at 1930305.

(f)

The Statement of Grounds on which Jurisdiction of this Court is involved:

(i) The date of the Judgement that was appealed from the Circuit Court of Geneva County, Alabama to the Supreme Court of Alabama to be reviewed is August 31, 1993

(ii) The date of the Decision of the Supreme Court of Alabama affirming with no opinion is June 24, 1994

(iii) The date overruling the Application for Rehearing filed with the Supreme Court of Alabama with no opinion is July 29, 1994

(iv) Not applicable.

(v) Jurisdiction to review this cause is conferred upon this Court by Provision of 28 U.S.C. 1257(a).

This Petition is before the Court on the alleged Constitutional violation of the Petitioner's rights under that clause of the Fifth Amendment, "xxx nor be deprived of xx or property, without due process of law xxx." The Petitioner here pleads she was deprived of an interest in her small tract of land without any legal process whatsoever.

(g)

Constitutional Provisions and Status involved in this Case:

The Fifth Amendment to the Constitution of the United States

(text included in Appendix)

Article I, Section 23, Constitution of Alabama

Statutes

No Statutes involved

(h)

STATEMENT OF CASE AND FACTS MATERIAL TO QUESTIONS PRESENTED

Initially it may be helpful to state that the usual format of outlining the procedures that ultimately resulted in a question believed to justify the presenting and grantin of this Petition are largely meaningless here. This is so because neither the pleadings nor the evidence at the hearing had thereon presented one scintilla of reason for the trial court's sua sponte decision to include its appealed from orders, a condemning of a portion of this petitioner's property for a right of way or easement of record. The parties did not seek it and not a single requirement of condemnation under eminent domain was present as the court proceeded to take and interest in Petitioner's property without due process or any process of law whatsoever.

1. The respondents filed a Complaint in the Circuit Court of Geneva County, Alabama on seeking certain riparian or water flow and control from water flowing from Petitioner's small tract.

2. Petitioner timely filed her answer. The matter came on for final hearing on January 29, 1991 and again on May 12, 1992. The entire record is available for immediate transmission to this Court on request as provided in the rules. Said record of proceeding is absolutely void of any evidence on condemnation of any part of

Petitioner's property until the Courts final Order of August 31, 1993.

3. The trial Courts order which, inter alia, ordered that placing on the land records of Geneva County, Alabama a right of way or easement over petitioner's small tract of land. (Appx. 19)

4. The Petitioner appealed the decision of the Trial Court to the Supreme Court of Alabama on sundry of the trial Court's findings, including, of course, the taking of an interest in Petitioner's property without due process. The Supreme Court merely entered an order affirming the Trial Court's decision. (Appx. 15)

5. The Petitioner urged a reconsideration through her motion and brief on rehearing. Again this appellant Court denied without opinion said request for rehearing on the 29th day of July, 1994. (Appx. 14)

(i)

SUMMARY OF ARGUMENT

This Petitioner presented the matter of the taking of an interest in Petitioners small tract of land by the trial court ordering a right of way or easement over said tract without any semblance of due process.

In the proceeding which gave rise to the trial court creating or taking of such interest in Petitioner's property, the plaintiffs' sought water control or water flow claims against your Petitioner. Never at anytime was there a claim to a recorded interest in their neighbor's property.

If there had been injected by appropriate proceedings or intervention to make or convert the case to one of condemnation, then in such event, the easement would necessarily have had to run to some entity. The Plaintiffs' in the case below are not made the recipients of this sua sponte created interest, nor could they lawfully be. The only government entity tact would have any jurisdiction would be Geneva County, Alabama, who was not even a party to the proceedings.

In summary then, the Court on it's own violation created by order a recorded interest in a portion of Petitioner's property without any legal process whatsoever.

ARGUMENT

(j-1)

The Trial Judge's ultimate decree of August 31, 1993 does not only address the question of dealing with the flow of water from adjacent or nearby properties across appellant's land, it actually invades this seventy-three year old lady's title to her small tract of land upon which her trailer is located. It orders a right of way, i.e., prescription or easement over a substantial part of appellant's small tract. The decree is specific in its terms that said title shall be diminished to said extent by the placing on record in the land records of Geneva Court said easement or right of way. The right of way is to be over this land in the form of a very substantial viaduct or elaborate ditch order and to be constructed by the appellant at her own expense.

To the appellant's knowledge, title to land can only be invaded or passed by the following: (a) by Deed; (b) by Will; (c) by inheritance; (d) by adverse possession; (e) by right of way for Egress and Ingress; (f) by condemnation because of use in criminal activity; (g) by Eminent Domain on payment of reasonable compensation.

The only way that appelant's title could be invaded for the purpose here present was for Geneva County to show the Court in a statutory condemnation proceeding the easement was essential for public need in which the County would pay just compensation and

construct such drainage accomodation as its engineers had shown to be necessary.

Article I, Section 23 of the Alabama Constitution of 1901 states,

> "xxx, but private property shall not be taken for, or applied to public use, unless just compensation be first made therefore; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner, ... that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations other than municipal, or for the benefit of any individual or association." (Emphasis Added).

The August 31, 1993, Trial Court's order violates this law or prohibition directly and openly. With no evidence to support an adverse possession claim, a prescriptive easement claim, an express easement claim, or even an implied easement claim, nor a right of way claim, nor having held a statutory proceeding under the power of Eminent Domain, this Trial Court orders not that the appellant will accept the natural surface water flowing form appellees property, but instead orders that there by on the land records a permanent easement across the appellant't property. The Trial Court further specifies the exact location, depth, elevation, size, width, length, curvature, etc., for this easement. This Trial Court has absolutely no regard for the possible rights of the appellant.

This prohibition is true to the extent that even the State cannot authorize an unlawful taking of private property including a right

of way. In the landmark case of Engelhardt v. Jenkins, 141 So.2d 193 this Court enjoined the State from just such action.

The opinion states on page 194,

> "In essence the case made by the bill as amended shows that the property of appellees was being taken by appellant with out proper condemnation proceeding and without paying them just compensation therefor, as the constitution and statue require. If this be so, this is taking private property by the State without due process in violation of both State and Federal constitutions. - 23 and 235, Alabama Constitution 1901; United States Constitution, 14th Amendment, 1."

The Fifth and Fourteenth Amendments to the United States Constitution prohibit property from being taken without due process and without judicial/statutory condemnation hearings being had.

The Fifth Amendment to the United States Constitution is unequivocal in its mandate that property cannot be taken from its owner except by due process and for compensation,

> "xxx or be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation." (Emphasis Added)

As above stated the Appellant is a seventy-three (73) year old widow. She lives alone in a trailer on an approximately twenty-five (25) acre tract of unproductive land. Her income is derived from social security benefits.

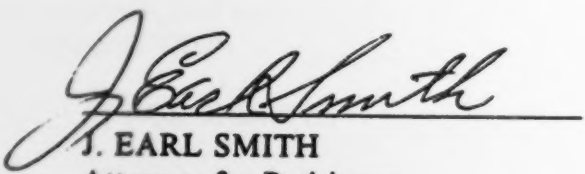
The law of Alabama and the Constitution of the United States prohibits such results as it is an abhorrence to the citizens of this Nation.

CONCLUSION

This appellant sincerely feels the Circuit Court's diminution of her title to her real property was in violation of law and of her constitutional rights under both the Constitution of the State of Alabama and of the United States. That said Circuit Court decree can cause her to lose her property without compensation and even her freedom because her inability to comply with such decrees.

If the title to any part or to any extent of appellant's property is to be affected, this should be accomplished by laws of eminent domain and lawful condemnation. The Petition should therefore be granted.

Respectfully submitted,



J. EARL SMITH
Attorney for Petitioner
128 SOUTH OATES STREET
Dothan, AL 36301
Telephone No.: 205/793-9882

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished three (3) copies of the foregoing Petition for Certiorari and Appendix thereto to W. Phil Eldridge, Esquire, P. O. Drawer 338, Hartford, AL 36344, Attorney for Respondents, by United States Mail, postage prepaid and properly addressed this 11th day of November, 1994.

J. EARL SMITH
128 SOUTH OATES STREET
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Telephone No.: 205/793-9882
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. _____

DORIS MEREDITH,

PETITIONER,

Versus

FRANK TRUMAN SCARBOROUGH,
WALTIE ELAINE SCARBOROUGH,
WILLIE PROCTOR and
JOAN PROCTOR

RESPONDENTS.

APENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF ALABAMA
JULY 29, 1994

1930305

Doris Meredith v. Frank Truman Scarborough, et. al. (Geneva: CV-89-135)

193-0384

Frank Truman Scarborough, et. al v. Doris Meredith. (Geneva: CV-89-135)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores and Ingram, JJ., concur.

STATE OF ALABAMA--JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1994

1930305

Doris Meredith v. Frank Truman Scarborough, et. al

1930384

Frank Truman Scarborough, et. al v. Doris Meredith

Appeals from Geneva Circuit Court, CV-89-135.

STEAGALL, JUSTICE.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala.R.App.P.

Hornsby, C. J., and Maddox, Shores and Ingram, JJ., concur.

EXHIBIT "A"

IN THE CIRCUIT COURT OF GENEVA COUNTY, ALABAMA

FRANK TRUMAN SCARBOROUGH,
WALTIE ELAINE SCARBOROUGH,
WILLIE PROCTOR AND,
JOAN PROCTOR,

Plaintiffs, **CASE NO.: CV-89-135(W)**

vs.

DORIS MEREDITH,

Defendant.

ORDER

This cause coming on to be heard upon the Motion to Show Cause has filed by the Plaintiffs on May 12, 1992 at 1:00 p.m. The Court in the presence of the attorneys of record for the parties to this cause, viewed the property in question, and took oral testimony regarding whether or not the Defendant had compied with the previous Order of this Court on May 31, 1991. The Court finds as follows:

1. That on May 31, 1994, a final Order was entered by this Honorable Court in this cause.

2. That the Plaintiffs filed a Motion to Show Cause as to why the Defendant should not be held in contemp of court for her failure to comply with said Order.

3. That, as a part of said Order of May 31, 1991, the Court found as follows:

> "That the Defendant cleared her property in 1987 of the trees and underbrush around this old drainage ditch and placed the debris from clearing her land in this old ditch, and later built a pond on the East side of her property in the path of this old ditch. That after these acts by the Defendant, the Plaintiffs now have a problem with their property flooding and their septic tanks backing up every time it rains. That Defendant's actions impeded and obstructed the natural flow of the surface water from the Plaintiffs' property across the Defendant's property through this old ditch as it had flowed for at least fifty to sixty years before these acts by Defendant."

4. That as a part of said Order, the Court order as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the injunctive relief requested by the Plaintiffs be granted and that the Defendant be and she is hereby ordered to return the natural flow of the surface waters from the Plaintiff's property over and across her property to its original and natural status as it existed before Defendant cleared her property in 1987, which was in and through the old drainage ditch along the elevation line as shown by the elevation map of surveyor, Elijah Branton. It is further ORDERED that the Defendant shall remove these obstructions and impediments and return the flow of the surface waters to the ordered status within sixty (60) days of the date of this order."

5. That the Court finds that the Defendant has not removed the debris from the ditch or moved the pond from the path of the ditch as previously ordered. The Court further finds that the Defendant has not returned the natural flow of the surface waters from the Plaintiff's property over and across her property to its original and natural

status as it existed prior to 1987, which was in and through the old drainage ditch along the elevation line as shown by the elevation map of surveyor, Elijah Branton.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court that the Defendant is in contempt of Court and she is given sixty (60) days from the date of this Order to purge herself by constructing a ditch through and across her property, beginning at point #30 on the diagram attached hereto as Exhibit "A", which is the property line between Defendant's property and the property of Plaintiffs, Frank Truman and Waltie Elaine Scarborough. The ditch shall begin at said point and be cut to an elevation of 100.08, and the ditch shall have a slope of two to one (2:1). The ditch shall continue at the same slope along the elevation line to a point approximatley 100 feet West of point #30 to where the same elevation surfaces (elevation 100.08). Then the Defendant shall construct a spillway at the west end of the pond shown on Exhibit "A" at point #15. The spillway shall have a six (6) feet wide and the sides of said spillway shall have a two to one (2:1) slope, the spillway shall be cut to an elevation of 99.58. Then the ditch shall continue West-Southwest along the elevation line on Exhibit "A" at the same slope to a point approximately 250 feet West-Southwest of point #15 between point #12 and point #11 where elevation 99.59 resurfaces.

It is FURTHER ORDERED, ADJUDGED, AND DECREED the Defendant does not construct a ditch and spillway as set forth herein above within sixty (60) days of the date of this order and the completion of same is not certified to this Court by Elijah Branton, a licensed surveyor, within said period of time, Defendant shall be brought before the Court to show cause, if any, she has for being in contempt and incarcerated if necessary,

IT IS FURTHER ORDERED, AND DECREED that the Plaintiff's shall construct, within fourteen (14) days of the Defendant's compliance with this order, a ditch over and across their property, and said ditch shall be six (6) feet wide and the sides of said ditch shall

have a slope of two to one (2:1). Said ditch shall begin at point #35 on the diagram attached hereto as Exhibit "A", which is a point just West of the East property line of the property of Plaintiffs, Willie Proctor and Joan Proctor. Said ditch shall begin at said point and be cut to an elevation of 100.58 and shall continue at a gradual slope west along the elevation line on Exhibit "A" to an elevation of 100.08 at point #30, which is the property line between the property of Plaintiffs, Frank Truman Scarborough and Waltie Elaine Scarborough, and Defendant.

IT IS FURTHER ORDERED ADJUDGED AND DECREED each party shall be responsible for and pay for the cost of construction of the ditch over and across their particular property as set forth herein above. It is further ORDERED that any questions concerning the interpretation of the diagram attached hereto shall be directed to Elijah Branton, a licensed surveyor, and his determination and recommendation shall be final and binding on all parties.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that this Order shall be recorded at the Probate Office in Geneva County, Alabama, in the real property records and that said ditch shall be a permanent easement and shall run with the property of the parties, and in the event that the pond is ever removed, any property owner of the property now owned by Defendant shall construct a similar ditch along the elevation line shown on Exhibit "A" through the pond shown on Exhibit "A".

ONE AND DATED this the 31st day of August, 1993.

CHARLES L. WOODS
Circuit Judge

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

No. 94-871

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DORIS MEREDITH
Petitioner

v.

FRANK TRUMAN SCARBOROUGH, WALTIE ELAINE SCARBOROUGH, WILLIE PROCTOR and JOAN PROCTOR
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF FOR RESPONDENT

W. Phil Eldridge
Counsel for Respondents
206 West Commerce Street
Hartford, Alabama 36344
(205) 588-3882

QUESTIONS PRESENTED FOR REVIEW

I. Whether an Order of a Trial Court Requiring Petitioner to Return the Natural Flow of Surface Waters from Respondents' Proprerty to its Original and Natural Status Constitutes a Taking Under the Fifth Amendment to the United States Constitution.

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Nininger v. Norwood, 72 Ala. 227 (Ala. 1882) 4

Panley Petroleum, Inc. v. United States, 591 F. 2d 1308, 1326 (C. L. Ct. 1979) 5

STATEMENT OF THE CASE

The original Order in this case was entered by the trial court on May 31, 1994. The Court granted the injunctive relief requested by the Respondents and ordered Petitioner to return the natural flow of the surface waters from Respondents' property to its original and natural status as it existed before Petitioner cleared her property in 1987 and deposited debris in the former water course causing Respondents' property to flood. At a hearing on Respondents' Motion to Show Cause on May 12, 1992, the court entered its order finding the Petitioner had not removed the debris from the drainage ditch as ordered and has not returned the natural flow of the surface waters to its original and natural state. The court found Petitioner in contempt of court and gave Petitioner 60 days to purge herself by constructing a drainage ditch and further ordering Respondents to construct a drainage ditch across their property, each party to pay costs of construction and further ordering the trial order to be recorded at the Probate office in Geneva County, Alabama in the real property records and that said ditch shall be a permanent easement and shall run with the

property of the parties. The order was signed by Charles L. Woods, Circuit Judge, and dated August 31, 1993. A copy of this order is included as the appendix to the Petition for Writ of Certiorari. On September 30, 1993, Petitioner filed a Motion for New Trial as to the contempt order on August 31, 1993. The lower court denied said motion on October 28, 1993. Petitioner filed a Notice of Appeal to the Alabama Supreme Court on December 7, 1993. (R83). The Alabama Supreme Court entered an order affirming the trial court's decision and afterward overruled Petitioner's Motion for Rehearing. (App., P. 14-15).

SUMMARY OF THE ARGUMENT

This case does not involve a taking. It is settled law that when two adjacent tracts of land belong to different persons, the upper or dominant tract has a natural easement or servitude in the lower for the discharge of all waters falling or accumulating from natural causes on the surface. Any interference with this right by the owner of the lower tract whereby the waters are thrown back upon the upper tract or whereby the natural flow of the waters is obstructed is a private nuisance for which injunction will lie. The trial court ordered Petitioner to restore the natural flow of surface waters from Respondents' property over and across Petitioner's property to its original and natural state. No taking was involved and the Petition for Certiorari is due to be denied.

ARGUMENT

Petitioner, Doris Meredith, contends that the Geneva County trial court's August 31, 1993 Order constitutes a taking under the Fifth Amendment to the U. S. Constitution and Article I, § 23 of the Alabama Constitution of 1901. (Pet. for Cert., P. 6-7) The August 31, 1993 Order required Meredith to construct a drainage ditch and spillway and stated that the ditch shall be permanent easement and shall run with property of the parties. Meredith claims that this Order constituted "a statutory condemnation proceeding." (Pet. for Cert., P. 7) This contention is wholly without merit. "The just compensation and due process clauses are triggered by governmental action." New York N. H. and H. R. Company v. United States, 305 F. Supp. 1049, 1055 (S. D. N. Y. 1969). There was no such governmental action in this case. The Scarboroughs, Respondents, as owners of the dominant tract of land, initiated this action in tort against Meredith, the owner of the lower adjacent tract of land to obtain injunctive relief for a continuing private nuisance to their property caused by Meredith's unlawful obstruction of the natural flow of surface

waters. In Nininger v. Norwood, 72 Ala. 227 (Ala. 1882), the Alabama Supreme Court held that as between adjacent tracts of land "the upper dominant tract has a natural easement or servitude in the lower tract, for the discharge of all waters falling or accumulating from natural causes on the surface; and any interference with this right, or obstruction of it, by the owner of the lower tract ... is a private nuisance which a court of equity will enjoin and abate."

Contrary to Petitioner Meredith's assertion, this action was not a condemnation proceeding. Moreover, the trial court, in fashioning relief for the Respondents Scarborough, was not acting pursuant to statutory condemnation powers. Under Panley Petroleum, Inc. v. United States, 591 F. 2d. 1308, 1326 (C.L. Ct. 1979), *cert.denied*, 444 U. S. 898, 100 S. Ct. 206 (1988), in order to establish a constitutional taking, plaintiffs must show that the officer committing the alleged taking had either express or implied legislative authority to take the property. The relief that the trial court ordered in its August 31, 1993 decree was merely the equitable relief to which the Scarboroughs were entitled as the owners of a dominant tract of land with an equitable servitude in Petitioner Meredith's tract for the natural flow of surface waters. This court ordered remedy is not a governmental action of the variety required for a constitutional taking.

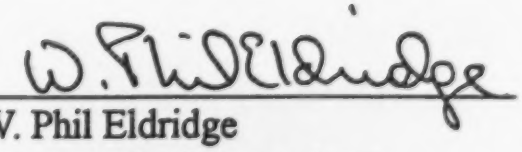
The record shows that Petitioner cleared her property of trees and underbrush in 1987 and put the debris from clearing her land in the old drainage ditch which ran across her property, thus diverting or obstructing the natural flow or drainage of the surface

water and causing the surface waters to be channeled directly onto the property of Respondents. Testimony also showed that Petitioner later built a pond where the ditch was located which also diverted or obstructed the natural flow of drainage of the surface water and caused the water to be channeled onto properties of the Respondents rather than flowing across Petitioner's property as it naturally did. Testimony showed that the flooding of Respondent's property occurred each time it rained. Therefore, the lower court issued a permanent injunction ordering Petitioner to restore the flow or drainage of the surface water over and across her property to its original and natural state before she obstructed or interfered with the flow. Respondents' lands, the upper or dominant tract, had a natural easement or servitude in Petitioner's land, the lower tract, for the discharge of all waters falling or accumulating from natural causes on the surface, the Petitioner could not interfere with or obstruct this easement as she did in the present case. Petitioner admitted in her brief to the Alabama Supreme Court that "Since the civil rule is the governing law in this case, the Defendant takes no issue with the fact that

under this rule, the Plaintiffs have an equitable servitude for the natural drainage of their water over and across her property." The Order of the trial court did not effect a taking of Petitioner's land, and the Petition for Certiorari is due to be denied.

CONCLUSION

Petitioner has absolutely failed to offer any authority in support of her position that the action of the trial court constituted a taking under the Fifth Amendment to the United States Constitution. There was no governmental action in this case. The action was not a condemnation proceeding. The trial court, in fashioning injunctive relief for Respondents Scarborough, was not acting pursuant to statutory condemnation powers. The relief was merely the equitable relief to which the Scarboroughs were entitled as the owners of a dominant tract of land with an equitalbe servitude in the lower tract for the natural flow of surface waters. This court ordered remedy is not a governmental action of the variety necessary for a constitutional taking. The Petition for Certiorari is due to be denied.



W. Phil Eldridge
Attorney for Respondents
206 West Commerce Street
Hartford, Alabama 36344
(205) 588-3882

CERTIFICATE OF SERVICE

I hereby certify that I have furnished three copies of the foregoing Response to Petition for Certiorari to J. Earl Smith, Attorney for Petitioner, 128 South Oates Street, Dothan, Alabama 36301, by United States Mail, postage prepaid and properly addressed.

Done this 29th day of November, 1994.

W. Phil Eldridge

W. Phil Eldridge